

DECISION



118505 *Mr. Eastwood*
PJW
THE COMPTROLLER GENERAL 22246
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-205641

DATE: June 22, 1982

MATTER OF: Vernon W. Gudkese

DIGEST: Army employee who performed the duties of a position that was later reclassified to a higher grade level, resulting in the employee's promotion, is not entitled to a retroactive promotion and backpay for the period his position may have been wrongly classified at the lower grade level. Employee is entitled only to the salary of the position to which he is appointed, even though the agency may have unreasonably delayed the reclassification process. For delay associated with reclassification, alleged violation of merit system principle of equal pay for equal work does not create action for monetary damages for period of erroneous classification.

Mr. Vernon W. Gudkese, an employee of the Department of the Army, appeals from a settlement of our Claims Group which denied his claim for backpay as the result of delayed reclassification of his position to a higher grade level. Since there is no authority to grant backpay for a period of wrongful classification or to pay damages for delays in processing classification appeals, Mr. Gudkese's claim is denied.

Mr. Gudkese states that on January 14, 1978, he was reassigned as a GS-12 Electronics Engineering Supervisor to the position of Chief, Instrumentation Division. He also states that after a month in the new job he asked his supervisor to have the civilian personnel office conduct a desk audit of his position because he thought it was undergraded. No audit resulted, and Mr. Gudkese submitted a formal written request in July 1978 to his supervisor for a position classification review. When it appeared that no action had been taken in response to that request, he filed a classification appeal with the Office of Personnel Management on August 29, 1979.

The Office of Personnel Management initially denied Mr. Gudkese's request that his position be reclassified at least one grade level higher as a Supervisory General

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Engineer. Upon reconsideration, however, the Office of Personnel Management reclassified Mr. Gudkese's position to a Supervisory Electronics Engineer, GS-13. This reclassification was certified to the Department of the Army on June 16, 1980, and the Army effected Mr. Gudkese's promotion on August 3, 1980. Subsequently, he submitted a claim for backpay for the period from the date he assumed his new position in January 1978, to the date he was promoted in 1980. The Army denied Mr. Gudkese's claim on the basis that the applicable regulations and decisions do not allow backpay incident to reclassification. The Office of Personnel Management advised Mr. Gudkese that it did not have authority to accept appeals requesting backpay and that the regulations contained in the Federal Personnel Manual do not authorize backpay in his situation. In response to his filing of a grievance, the U.S. Army Civilian Appellate Review Agency similarly ruled that Mr. Gudkese was not entitled to backpay.

When Mr. Gudkese filed a claim with our Claims Group for backpay in June 1981, he added two arguments that he had not raised at an earlier point in the administrative proceedings. He contended that the Army, in the time period from February 1978 to August 1979 " * * * failed to take appropriate action within a reasonable time period * * *" in response to his request for a classification audit. He also claimed that his statutory rights under Title I of the Civil Service Reform Act of 1978, Pub. L. 95-454, Oct. 13, 1978, 92 Stat. 1113 et seq., 5 U.S.C. 2301 et seq. (Supp. III, 1979), were violated.

When Mr. Gudkese sought backpay from the Army and Office of Personnel Management, he based his claim on the premise that since 1978 he had been compensated at the GS-12 salary rate for performing the duties of the position that was reclassified in 1980 to a GS-13 level. However, the general rule in classification matters is that an employee of the Government is entitled only to the salary of the position to which he is appointed, regardless of the duties he performs. When an employee performs duties normally performed by one in a grade level higher than the grade he holds, he is not entitled to the salary of the higher grade level until he is promoted to the higher grade position. Matter of McGrath, 57 Comp. Gen. 404, 405 (1978).

Neither the Back Pay Act, 5 U.S.C. § 5596 nor the classification statute, 5 U.S.C. § 5101 et seq., provides a monetary remedy for periods of wrongful classification. Testan v. United States, 424 U.S. 392 (1976). In a situation where plaintiffs after 9 years of litigation were successful in having their positions reclassified from grade GS-12 to GS-14, the lower court held that the Supreme Court's decision in Testan precludes the award of damages " * * * even though plaintiffs suffered monetary losses which appear to have been due to unjustifiable agency procrastination, indecision and error * * *." Leopold v. United States Civil Service Commission, 450 F. Supp. 154 (E.D.N.Y. 1978). Although Mr. Gudkese points out that the Testan decision predated enactment of the Civil Service Reform Act of 1978, that Act did not amend the Back Pay Act or the classification statutes to create a monetary remedy for periods of erroneous classification. Since the Testan decision relates to the remedy for erroneous classification and since the Civil Service Reform Act did not provide an additional remedy in those circumstances the Army and Office of Personnel Management were correct in denying Mr. Gudkese's claim for backpay for the period prior to reclassification of his position. See Matter of Wedemeyer, B-200638, October 9, 1981.

Claimant attempts to separate the agency delay from February 1978 to August 1979 in not acting on his reclassification requests from the rest of the reclassification process and asserts that delay as an independent cause of action for which he claims money damages. We have held that agency personnel actions which were alleged to be intentionally directed at preventing the proper establishment of an employee's position and grade and which intentionally, unreasonably delayed the reclassification process were all part of the reclassification process for which there is no remedy in money damages for retroactive promotion. Matter of Odom, B-196824, May 12, 1980. It is also noted that the claimant could have prevented unnecessary delay at an earlier time by going to the Office of Personnel Management, which he eventually did. See also Leopold v. United States, cited above, and Matter of Tate, B-203622, January 19, 1982, in which administrative delays in reclassification and grievance procedures resulting in promotion delays were held insufficient to sustain an award of monetary damages.

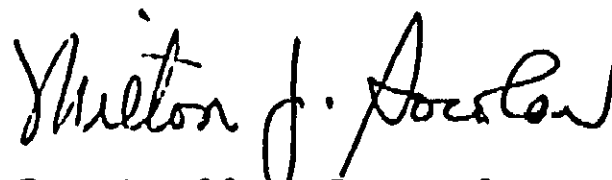
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Mr. Gudkese's argument which is based on his assertion that the Army violated the merit system principles and prohibited personnel practices found in Title I of the Civil Service Reform Act provides no basis for a monetary remedy. He claims that the Army's failure to process his request for a classification audit within a reasonable period of time violated the merit system principle of equal pay for work of equal value set forth at 5 U.S.C. § 2301(b)(3) (Supp. III, 1979) and resulted in a prohibited personnel practice under 5 U.S.C. § 2302(b)(11) (Supp. III, 1979). He suggests that 5 U.S.C. § 2304 gives the Comptroller General authority to consider his claim for monetary damages arising out of alleged violation of 5 U.S.C. §§ 2301 and 2302.

In addition to the response that an employee has no right to backpay or damages for delays in classification of his position, an employee has no right of action for a violation of the merit system principles themselves. Unless a law, rule, or regulation implementing or directly concerning the principles is violated, the principles themselves may not be made the basis of a legal action by an employee or agency. Wells v. Harris, 1 MSPB 199, 203 (1980). Neither is that remedy supplied by the language of 5 U.S.C. § 2302 to which Mr. Gudkese refers. In Wells v. Harris the Merit Systems Protection Board specifically dismissed the argument that a prohibited personnel practice can be established under subsection 2302(b)(11) merely by showing a violation of the merit system principles.

The fact that the Comptroller General is given broad audit authority under 5 U.S.C. § 2304 does not change the conclusion that there is no remedy in the nature of backpay for periods of wrongful classification or delay associated with reclassification.

For the reasons stated above, the Claims Group's action denying Mr. Gudkese's claim for damages in the nature of backpay for the period from February 1978 to August 1979 is sustained.


for Comptroller General
of the United States